

## Module 2 Cheques, payments, and the concept of negotiability

Historically, cheques were a special form of a bill of exchange. However, the different functions of a cheque, and a bill, led to separate legislation: Cheques Act 1986 (Cth)

### Introduction, Signature, Crossing, and Negotiability

#### Definition and Introduction

Cheques are a form of payment instrument; they are also a form of potentially multiparty contract: ownership of the cheque can be transferred (negotiated) from one person to another

#### **S 10 of Cheques Act**

(1) A cheque is an **unconditional order in writing** that:

- (a) is addressed by a person to another person, being a financial institution (defined in s 3); and
- (b) is signed by the person giving it; and
- (c) requires the financial institution to pay on demand a sum certain in money

(2) An instrument that does not comply with (1), or that orders any act to be done in addition to the payment of money, is **not** a cheque.

Bills of Exchange: payable after expiration of certain periods

Cheques: payable on demand

#### What happens when we write a cheque?

Drawer (usually customer of a bank)---Payee---Payee's bank (collecting bank)---Drawee bank (drawer's bank) [drawer owes duties to Drawer's bank]

#### The signature of the drawer of a cheque serves three purposes:

- Formal requirement for creation of a "cheque" under *Cheques Act* s 10(b)
- Pre-condition to liability of drawer: *Cheques Act* s 31 [not liable unless signed]
  - o S 71: liability of drawer
    - When the cheque is on due presentment for payment, the cheque will be paid
    - If the drawer fails to pay, then the cheque may be presented to the indorser, and under s 71(b), the drawer compensates the indorser. Drawer is primarily liable for a cheque
  - o S 73: liability of indorser
    - On due presentment for payment, the cheque will be paid according to its tenor as indorsed by the indorser
    - If the cheque is dishonoured when duly presented, the indorser will compensate the holder or a subsequent indorser who is compelled to pay the cheque
- Mandate to banker to debit drawer's account
  - o Cheques can be signed in two capacities: drawer or indorser
  - o Bill of Exchange can be signed in three capacities: drawer, indorser, and acceptor
  - o If you sign the negotiable instrument, there are statutory consequences

#### What if the signature is forged?

S 32: a forgery will **not** bind the victim unless there is estoppel or ratification.

#### **32 Unauthorised signature**

(1) Where a signature is written or placed on a cheque as that of the drawer without the authority of the person whose signature it purports to be (the relevant person), the signature is wholly inoperative as that of the relevant person unless:

- (a) the person against whom it is sought to assert a right on the cheque is estopped from denying the genuineness of the signature or the existence of authority for the signature, as the case requires; or
- (b) the signature is ratified or adopted by the relevant person

But the signature operates as the signature of the person who actually signed it in favour of any person who, in good faith and without notice, pays the cheque or takes the cheque for value.

## Order and Bearer Cheques

### **S 21 Cheques payable to order**

A cheque is payable to order if the cheque is expressed, whether originally or by indorsement, to require the drawee institution to pay the sum ordered to be paid by the cheque to or to the order of:

- (a) a person specified in the cheque as payee or indorsee; or
- (b) 2 or more persons specified in the cheque, jointly or in the alternative, as payee or indorsee

### **s 22 Cheques payable to bearer**

Where a cheque is not payable to order, the cheque:

- (a) is a cheque payable to bearer; and
- (b) shall be taken to require the drawee institution to pay the sum ordered to be paid by the cheque to bearer

## **Crossing**

### **S 53 Crossing and crossed cheque defined**

Two ways:

- (1)(a) 2 parallel transverse lines; or
- (1)(b) 2 parallel transverse lines with the words “not negotiable” between, or substantially between, the lines

### **s 54 Effect of crossing on payment of cheque**

A crossing of a cheque has effect as a direction by the drawer to the drawee institution not to pay the cheque otherwise than to a financial institution.

### **S 55 Effect of taking cheque crossed “not negotiable”**

Where such a cheque is transferred by negotiation to a person, the person does not receive, and is not capable of giving, a better title to the cheque than the title that the person from whom the first-mentioned person took the cheque had.

## **Negotiability of cheques**

The concept of “negotiability” refers to 3 things:

1. A method of transfer:
  - a. Negotiability means capacity of being transferred by delivery or indorsement, so as to constitute the transferee, taking bona fide and for value, the true owner: per Issac J in *Commissioner of the State Savings Bank v Permewan*
  - b. All cheques are inherently negotiable
  - c. negotiable instruments are transferable by:
    - i. Delivery for value to another person: CA s 40(3) [bearer cheque]
    - ii. Indorsement by the holder (eg, initially the payee) and delivery to another person pursuant to the contract between holder and that other person: CA ss 40(2), 40(1) [order cheque]
2. Transfer free of equities: enhancement of title
  - a. Only holder can enforce payment
    - i. **S 3: “Holder”**
      1. (1) in relation to a cheque payable to order—the payee or an indorsee who is in possession of the cheque as payee or indorsee, as the case may be; and
      2. (2) in relation to a cheque payable to bearer—the bearer
  - b. If you are a **holder in due course (s 50)**, you can take title free from any defect in title of prior parties & enforce the cheque against any liable person (**s 49**)
    - i. If the cheque is crossed and marked “not negotiable”, despite being a purchaser for value in good faith, you would not hold it free from defect
    - ii. If it is not so marked, a bona fide purchaser without notice can enforce it, provided that the person is the holder
  - c. No title can derive from a forged indorsement
3. Holder of cheque may sue in his or her own name (s 49(1))
  - a. Exception to the common law of privity of contract

### **S 39 Every cheques transferable by negotiation**

(3) the crossing of a cheque does not affect the transferability of the cheque by negotiation

#### **s 40 Transfer of cheque by negotiation**

(2) A cheque payable to order is transferred by negotiation if:

- (a) it is indorsed by the holder; and
- (b) the cheque is delivered so as to complete the contract arising out of the indorsement.

(3) A cheque payable to bearer is transferred by negotiation if it is delivered by the holder to another person (whether or not the cheque is indorsed by the holder).

#### **s 49 Rights acquired by transfer by negotiation**

(1) The holder of a cheque may sue on the cheque in the holder's own name

(2) A holder of a cheque who is a holder in due course:

- (a) holds the cheque free from any defect in the title of prior parties as well as from mere personal defences available to prior parties against one another; and
- (b) may enforce payment of the cheque against any person liable on the cheque

(3) Where:

- (a) the title of the holder of a cheque is defective; and
- (b) the holder transfers the cheque by negotiation to a holder in due course

The holder in due course receives a good and complete title to the cheque.

#### **S 50 Holder in due course defined**

(1) The holder of a cheque is a holder in due course if:

(a) the cheque was transferred by negotiation to the holder and, at the time when the holder took the cheque, the cheque:

- (i) was complete and regular on the face of it;
- (ii) was not a stale cheque; and
- (iii) did not bear a crossing of the kind referred to in para 53(1)(b) ("not negotiable"); and

(b) the holder took the cheque:

- (i) in good faith;
- (ii) for value; and

(iii) without notice of any dishonor or defect

#### **Cheques can be stolen**

##### *Parsons v R*

Facts	<ul style="list-style-type: none"><li>- appellant was employed by a company. He made false representations to proprietors of newsagents and, as a result, obtained cheques from them payable to the company.</li><li>- He banked the cheques and misappropriated the proceeds</li><li>- Convicted of dishonestly obtaining property belonging to another by deception</li><li>- S 71(2) of Crimes Act (Vic) provided that "property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest"</li></ul>
Issue	Whether the cheques are "property belonging to another"
Judgement	The instruments (cheques) were property belonging to the newsagents within the meaning of s 71(2) because the newsagents had possession or control of them and also had proprietary rights or interests therein.
Application	Cheques are property capable of being stolen

#### **Duties undertaken by parties to a cheque to each other, and liability on the cheque**

##### **Duty from drawer to drawee bank**

###### 1. MacMillan Duty

Careless drawing of cheques: Customer has a duty to take usual and reasonable precautions in drawing a cheque to prevent a fraudulent alteration which might occasion loss to the banker.

*London Joint Stock Bank Ltd v MacMillan*

Facts	<ul style="list-style-type: none"> <li>- A firm entrusted to a confidential clerk the duty of filling in their cheques for signature</li> <li>- The clerk presented the cheque to one of the partners for signature, there was no sum in words and there were the figures of "2" in the space intended for figures</li> <li>- The partner signed the cheque, and the clerk subsequently wrote "1" and "0" on each side of the figure "2", and added the words "one hundred and twenty pounds"</li> <li>- The clerk presented the cheque for payment at the firm's bank, and obtained payment</li> </ul>
Issue	Does the firm have a claim against the bank?
Judgment	<p>No. The firm breached its duty to take care in the mode of drawing the cheque, to prevent forgery. The alteration in the amount was the direct result of that breach of duty, and the bank were therefore entitled to debit the firm's account with the full amount of the cheque.</p> <p>Court: The confidence in the clerk cannot excuse his neglect of his duty to the banker. The duty is not a duty to have clerks whom the customer believes to be honest. It is a specific duty as to the preparation of the order upon the banker.</p>
Ratio	A customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery, and if as the natural and direct result of the neglect of those precautions the amount of the cheque is increased by forgery, the customer must bear the loss as between himself and the banker
Application	<ol style="list-style-type: none"> <li>1. Drawers owe a duty to draw cheque in a careful way, including taking reasonable precautions to prevent forgery</li> <li>2. Leaving blank spaces facilitates fraud and may be evidence of breach of the duty</li> <li>3. Trusting an employee, a clerk, or someone else to "do the right thing" is no excuse</li> <li>4. Drawer is bound by actions of an agent to whom the responsibility of filling up a cheque is delegated</li> <li>5. This duty only applies in relation to cheques</li> </ol>

*Alceon Group Pty Ltd v Rose*

Facts	<ul style="list-style-type: none"> <li>- CR incorporated QPS in 2002</li> <li>- Quadwest was incorporated in 2005, which is wholly owned by QPS, for the sole purpose to develop a site in Perth</li> <li>- Quadwest initially obtained funding from BOSI (bank). The loan was to be repaid by 2010</li> <li>- By 2010, Quadwest was in financial trouble, then various steps were taken towards the administration or liquidation of Quadwest</li> <li>- In 2011, CR sought finance from the plaintiff (Alceon), a lending institution, and the Alceon investment committee would only enter into agreement with Quadwest if personal guarantee is provided</li> <li>- The personal guarantee is provided by CR and his parents, and the guarantees of the parents were to be secured by a mortgage over their home</li> </ul>
Issue	Can PR or Mrs. R avoid liability on the ground of: 1) misleading conduct; 2) unconscionable conduct; 3) undue influence (for Mrs. R in particular)?

Judgment	<p>The court found that PR has no valid defence, and Alceon's claim against PR succeed.</p> <p>The court let Mrs R escape liability on the basis of unconscionability.</p> <ul style="list-style-type: none"> <li>- She had left all financial decisions to her husband, signed document as he requested, without any enquiry as to their nature or effect</li> <li>- This has been the position throughout 58 years of marriage, and she was 81 when she signed the document</li> <li>- Although Mrs. R know what a mortgage is in theory, she had no appreciation of the magnitude of the risk of default, and thus the risk that Alceon would exercise its rights under the mortgage.</li> <li>- Mrs. R stood to gain no personal material benefit, and PR and CR did not communicate the risk to her. She trusted both of them with respect to financial matters.</li> </ul> <p>Para[78]: summary of the decision in Garcia</p> <p>With respect to Alceon's notice, it was held that Alceon understand the facts, and the question is whether Alceon reasonably believed that the transaction had been adequately explained to her by "a competent, independent and disinterested stranger". Alceon cannot rely on Quadwest's solicitor to give Mrs R such advice, because their interests are in direct conflict.</p>
Application	<ol style="list-style-type: none"> <li>1. Decision in Garcia is not confined to matrimonial relationships</li> <li>2. The underlying factor is the trust and confidence reposed by one party to the relationship in the other, where that trust and confidence is, or ought to be, apparent to the proposed lender</li> </ol>